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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1325

ONE 1963 CHEVROLET PICKUP TRUCK
AND THOMAS J. MULL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari
to the Supreme Court of
Appeals of Virginia

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TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATION JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, One 1963 Chevrolet Pickup Truck and Thomas J. Mull, respectfully prays that a Writ of Certiorari be issued by the above-styled Court to review the judgment of the Supreme Court of Appeals of Virginia, rendered on January 15, 1968 in affirming the Circuit Court of Botecourt County judgment that One 1963 Chevrolet Pickup Truck should be forfeited. The official report of the deci-

sion of the Virginia Supreme Court of Appeals is 208 Va. 506, 158 S.E. 2d 755, a copy of the opinion is included in this petition as appendix A-1.

PROCEEDINGS IN COURTS BELOW

The references made hereinafter are to the pages of the record of the proceedings in the Circuit Court of Botetourt County which were used in the Supreme Court of Appeals of Virginia and shall be referred to as (R) using the original page numbers.

This litigation was commenced when the Commonwealth Attorney filed an information (Code ¶ 4-56 of the 1950 Code of Virginia, as amended) against a 1963 Chevrolet Pickup Truck and Thomas J. Mull, the owner. The Circuit Court of Botetourt County setting as Judge and jury heard the evidence and ordered the forfeiture of the bond posted by Mull. The Virginia Supreme Court by order entered the 30th day of November, 1966 awarded your petitioner a Writ of Error and after briefs were filed and oral argument presented, judgment affirming the trial court was entered on January 15, 1968. An order staying execution of judgment was entered on the 16th day of February, 1968 by the Supreme Court of Appeals of Virginia in order that petitioner might present this Petition for Writ of Certiorari to review the proceedings below. (Appendix A-2) The question involved herein, which was raised in the Trial Court and in the State Appellate Court is as follows:

THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHICH WAS THE RESULT OF AN UNREASONABLE SEARCH AND SEIZURE AND IN THAT SO DOING VIOLATED CONSTITUTIONAL RIGHTS AND GUARANTEES OF THE INDIVIDUAL.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257 (3).

28 U.S.C. § 1257 (3) provides for review by Writ of Certiorari by this honorable Court where a right, privilege or immunity specifically set up or claimed under the Consti-

tution is involved and the constitutional provisions involved herein are as follows, from the Constitution of the United States:

Amendment IV

> *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,* supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added).

Amendment V

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, *nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added).

Amendment XIV

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (emphasis added).

Constitutional questions were raised in the Trial Court and in the State Appellate Court.

QUESTION PRESENTED

THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE WHICH WAS THE RESULT OF AN UNREASONABLE SEARCH AND SEIZURE AND IN THAT SO DOING VIOLATED CONSTITUTIONAL RIGHTS AND GUARANTEES OF THE INDIVIDUAL, AND IT BEING PETITIONER'S CONTENTION:

(1) That there was no probable cause for the search of Mull's pickup truck.

(2) The search and seizure of the evidence was unreasonable in that a search warrant was required.

STATEMENT OF FACTS

The petitioner, Thomas J. Mull, and a guest were in a 1963 Chevrolet Pickup Truck being operated in a northerly direction along Interstate Highway No. 81 in Botetourt County, Virginia. A.B.C. Agent, G. M. Whiteside, knew Thomas Mull and knew that Thomas Mull's reputation for violating the A.B.C. law of Virginia was bad. (R.p.5) Officer Whiteside *stated that the only reason for stopping the vehicle* was his prior knowledge of the defendant's activities. (R.p.5) (emphasis added). Officer Whiteside observed a quantity of alcoholic beverage on the front seat and that he walked around the 1963 Chevrolet Pickup Truck and observed some bottle tops that he assumed were alcoholic beverages. That he then searched the vehicle without a search warrant and found four gallons of A.B.C. liquor. (R.p.5) Thomas J. Mull was charged with unlawfully transporting alcoholic beverages in excess of one gallon in violation of § 4-72 of the 1950 Code of Virginia, as amended.

Pursuant to the violation, the Commonwealth of Virginia through the Commonwealth's Attorney, E. C. Westerman, Jr., filed forfeiture proceedings against the vehicle belonging to Thomas J. Mull, it being a 1963 Chevrolet Pickup Truck, No. 3C14413114662.

On May 25, 1966, the defendant by counsel, filed a Motion to Suppress which is set out fully.

MOTION TO SUPPRESS EVIDENCE

To The Honorable Earl L. Abbott, Judge of Said Court:

Comes now the defendant, Thomas J. Mull, by counsel, and moves the Court to suppress the evidence in captioned matter, as the said evidence was obtained by unlawful search and seizure, in violation of defendant's rights guaranteed by Article I, Section 10 of the Virginia Constitution; the Fourth and the Fourteenth Amendments to the United States Constitution; and Section 19.1-88 and 4-56 of the 1950 Code of Virginia as amended.

THOMAS J. MULL
By Counsel

This motion was overruled and error was assigned to the Supreme Court of Virginia. (R.p.4) The Virginia Supreme Court of Appeals affirmed the trial court's ruling but did not discuss any of the constitutional questions involved confining its opinion to an interpretation of § 4-56 of the 1950 Code of Virginia, as amended. This decision will be fully discussed in petitioner's argument which follows:

REASON FOR ALLOWANCE OF CERTIORARI

Thomas J. Mull, a United States citizen with a reputation for violating the A.B.C. law of Virginia, is still entitled to be free from being detained on a public highway by an A.B.C. officer whose only reason for detaining him is knowledge that he has a bad reputation for violating the A.B.C. law. In addition, the United States Constitution protects every citizen, which includes Thomas Mull, from an unreasonable search and seizure and that by decisions of this Court a search warrant shall be obtained before a search, except under certain limited conditions.

Even though the Supreme Court of the United States is overburdened beyond belief, it will still protect lowly individuals with reputations for violating A.B.C. laws from being deprived of their constitutionally protected individual rights.

ARGUMENT

Counsel for petitioner would be less than candid with this court if he did not state at the outset that the narrative record of the proceedings in the trial court is, as the Supreme Court of Appeals of Virginia points out, "woefully inadequate". Perhaps this is the reason that the Supreme Court of Appeals of Virginia decision in this case does not touch on the constitutional issues raised but rather interprets in the abstract a statute without once applying the legal standards set out to the facts of the case on appeal.

It is respectfully submitted, however, that where even an inadequate record clearly shows violations of constitutional standards, the case should be vacated or remanded for a more complete factual determination. Particularly is this true in criminal cases or quasi criminal cases such as forfeiture proceedings.

This court has said that the rule excluding evidence obtained by a search and seizure unlawful under the Fourth Amendment to the Constitution of the United States is by virtue of the Fourteenth Amendment applicable to state forfeiture proceedings such as the instant case. *One Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 14 L.Ed.2d 170, 85 S.Ct. 1246. Mr. Justice Black concurring in the above cited case stated that the decision should be based upon the Fifth Amendment's protection against self incrimination as well as upon the Fourth Amendment's protection against unreasonable search and seizure. 380 U.S. 703, 14 L.Ed.2d 176.

It is interesting to note that on remand, the Supreme Court of Pennsylvania found no probable cause on facts similar too, but much stronger than the facts in this case. *Commonwealth of Pennsylvania v. One 1958 Plymouth Sedan,* 418 Pa. 457, 211 A.2d 536.

It is clear therefore in this case that if the evidence obtained by Officer Whiteside was by an unreasonable search and seizure, then the evidence should have been suppressed by the trial court and the Motion to Suppress Evidence should have been sustained.

(1) THERE WAS NO PROBABLE CAUSE FOR OFFICER WHITESIDE TO STOP AND SEARCH MULL'S VEHICLE.

The record states that "A.B.C. Agent G. M. Whiteside passed the pickup truck on the highway and that acting on prior knowledge and information stopped the defendant's vehicle on the highway, ..." "On cross-examination, witness Whiteside stated his only reason for stopping the vehicle was his prior knowledge of the defendant's activities." (R. p.5). At the time the narrative record was prepared, it was thought that the language chosen clearly showed that Officer Whiteside stopped Mull to check him because of his own personal suspicions arising from knowledge of Mull's past conduct. It is admitted that the language used in the narrative record is susceptible to several interpretations but what actually transpired in the trial court was crystal clear. Officer Whiteside saw him operating the pickup on Interstate 81 and stopped him because he suspected that Mull was "up to his old tricks". There was no evidence offered that he had seen Mull earlier loading the vehicle, no evidence that Mull had been in the vicinity of any A.B.C. stores earlier in the day, no evidence that an informer had given Whiteside information concerning Mull's activities and no evidence that Mull's vehicle was loaded in the rear or that any portion of the illegal alcohol was visible until after the vehicle had been stopped.

This court has on several occasions set forth guidelines as to what constitutes probable cause to search. "Probable cause exists where the facts and circumstances, within the arresting officer's knowledge and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Draper v. United States,* 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329, *Brinegar v. United States,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1879, 69 S.Ct. 1302, *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280.

These cases all decided by divided courts hold that there was probable cause for the searches involved. The facts in all three are much stronger and clearer than in this case.

In *Draper,* the officer had been given information by an informer concerning the defendant's conduct before the time of arrest. In *Brinegar,* the officer had personal knowledge of the defendant's conduct, that the car at the time of observation was heavily loaded and the defendant attempted to outrun the officer's car when he saw the patrol car. In *Carroll,* the officers had personal knowledge of defendant's conduct, had almost consummated a sale of illegal liquor with the defendant, had his license number in a location that was one of the most active centers for introducing illegally made liquor into the United States during the period of time in the United States when all alcoholic beverages were banned.

The facts in the case before this court are far less clear than in any of the above mentioned cases. There could be no probable cause in this case, unless mere suspicion, on the part of Officer Whiteside, because of Mull's past record is to be treated as probable cause.

If this be true, then there are two different standards being applied. Clearly, in the United States, no A.B.C. officer or Federal Treasury Officer has the right to stop automobiles indiscriminately and search them for illegal liquor. Your petitioner is convinced that this court will not therefore allow any less standard for citizens with a record of violating state or federal liquor laws. Does one violation of the A.B.C. law entitle an A.B.C. officer to stop that person every time he goes upon the public highway? The answer must be "no" or clearly then those people with A.B.C. records are being denied equal protection of the laws.

This court has set forth the following as its guide in balancing the individual's interest with society's interest.

> "The rule of probable cause is a practical nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing

interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Beck v. Ohio,* 379 U.S. 89, 91, 13 L.Ed.2d 142, 145, 85 S.Ct. 233.

The facts in *Beck v. Ohio,* 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 were similar to the instant case. The record in that case was very brief the same as here. The court said at 379 U.S. 589, page 96:

"All that the trial court was told in this case was that the officers knew what the petitioner looked like, and knew that he had a previous record of arrests or convictions for violations of the clearing house law, beyond that the arresting officer who testified said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner. We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause. See *Brinegar v. United States,* 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302. But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will.

"It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerable more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible. We may assume that the officers acted in good faith in arresting the petitioner. But good faith on the part of the officers is not enough. *Henry v. United States,* 361 U.S. 98, 102 4 L.Ed.2d 134, 138, 80 S.Ct. 168. If subjective good faith alone were the test, the protections of the Fourth Amend-

> ment would evaporate and the people would be 'secure in their persons, houses, papers and effects, only in the discretion of the police.'"

The above language sets forth this court's feeling as to what constitutes probable cause to arrest, there is certainly no less standard required as to what constitutes probable cause to search.

Your petitioner respectfully suggests that in this case Officer Whiteside had only his suspicions; there was nothing more. Consequently, the Commonwealth of Virginia failed to prove probable cause, and in so failing, the search was illegal and the evidence should have been suppressed by the trial court.

It is anticipated that the Attorney General of Virginia will argue relying on *Myown Development v. Commonwealth*, 159 Va. 1004, 167 S.E. 374, that the burden of proof is on the claimant in a forfeiture proceeding. Since this court's ruling in *One Plymouth Sedan v. Pennsylvania*, supra, holding forfeiture proceedings to be quasi criminal, it is respectfully submitted that the burden of proof in state forfeiture proceedings as in other criminal cases is clearly on the Commonwealth.

(2) THE SEARCH AND SEIZURE OF THE EVIDENCE WAS UNREASONABLE IN THAT A SEARCH WARRANT WAS REQUIRED.

The Supreme Court of Appeals of Virginia opinion in this case holds that the language of the following statute is not controlling in all instances. The statute is set out here for this court's benefit. § 4-56 of the 1950 Code of Virginia, as amended:

> § 4-56 SEARCH, SEIZURE AND FORFEITURE OF CONVEYANCES OR VEHICLES USED IN VIOLATION OF LAW: DISPOSITION OF BEVERAGES: ARRESTS.
> —(a) Search, seizure and delivery to sheriff or sergeant.—*Where any officer charged with the enforcement of the alcoholic beverage laws* of this State *shall have reason to believe that* alcoholic beverages,

> illegally acquired, or that alcoholic beverages being illegally transported, are, in any conveyance or vehicle of any kind, either on land or on water [Except a conveyance or vehicle owned or operated by a railroad, express, sleeping or parlor car or steamboat company, other than barges, tugs or small craft), *it shall be the duty of such officer to obtain a legal search warrant and search such conveyance or vehicle,* and if such illegally acquired alcoholic beverages or alcoholic beverages being illegally transported in amounts in excess of one quart be found therein, he shall seize the same, and shall also take possession of such conveyance or vehicle and deliver the same and the alcoholic beverages so seized, to the sheriff of the county, or the sergeant of the city in which such seizure was made, taking his receipt therefor in duplicate. (Emphasis Added)

It is true that the interpretation of a state's statutes by the highest court of that state is generally not reviewed by this court. But where the code section is only a codification of one of the individual's basic rights, then an opinion which totally ignores a basic constitutional question raised should be reviewed by this court.

The Virginia Court points out in its opinion of this case that its statutes, "providing for the issuance of search warrants and forbidding search without a warrant that their requirements are the same in substance as those contained in the Fourth Amendment to the Constitution of the United States." 208 Va. 508, 158 S.E. 2d 757.

Your petitioner agrees most earnestly with the above quoted passage and further agrees when the Virginia Supreme Court points out that there are certain recognized exceptions to the general rule prohibiting searches and seizures unless there is a properly issued search warrant. The Virginia Court lists four exceptions at 208 Va. 508, 157 S.E. 2d 757: (1) "Where the search is consented to." (2) "Where the search is incident to a lawful arrest." (3) "Where the search is of abandoned premises or property."

The court then states, "It has been held also that a seizure made without a search; that is, where that which is seized is in plain and open view is not unlawful." 208 Va. 508, 151 S.E. 2d, 757.

The fatal defect is that court never decides whether the factual situation presented falls under one of the exceptions. In fact, the record clearly shows that none of the exceptions do apply.

Since none of the exceptions apply, then Officer Whiteside should have obtained a search warrant. That is what the statute requires him to do and even more important, that is what the Virginia and United States Constitution requires.

For the sake of argument let's assume that which did not occur, and that Officer Whiteside had seen him earlier purchasing more than the legal limits of A.B.C. liquor. Officer Whiteside would then have had the requisite probable cause to have obtained a search warrant. It would not have imposed any burden on Officer Whiteside to have obtained a proper search warrant. Officer Whiteside knew him, where he lived, and could have obtained his conviction within the limits of Mull's constitutionally protected rights.

In conclusion, your petitioner regrets that the record in this case is not as clear as it should have been, because, had there been an actual transcript of the proceedings, the issues would be clearly defined and decision would be much easier. Mr. Justice Clark, speaking for eight members of the court in *Kerr v. California*, 374 U.S. 23, 34, 10 L.Ed.2d 726, 738, 83 S.Ct. 1623, said, concerning whether a record would support a finding of probable cause: "While this court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness—i.e., constitutional—criteria established by this court have been respected."

Your petitioner could ask for no more consideration. The greatness of our constitutional democracy is that it guarantees to every person, including those who are carrying more than the legal limit of alcoholic beverages, that they shall not have their possessions taken from them in violation of the Constitution. The proceeds from the sale of One 1963 Chevrolet Pickup Truck are not so valuable to the Commonwealth of Virginia that it outweighs each citizen's individual rights.

CONCLUSION

It is respectfully submitted that this Petition, herewith made for issuance of Writ of Certiorari should be granted upon the facts and circumstances of the trial of this case as reflected by the record of same and that the case should be remanded for a new trial, in accordance with the law and constitutional guarantees so as to accord petitioner's due process of law and not deprive him of constitutional rights, which were denied him by the failure to exclude the evidence obtained by an unreasonable search and seizure.

PRAYER

Accordingly, petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

ONE 1963 CHEVROLET PICKUP TRUCK AND THOMAS J. MULL

By Counsel

WILLIAM B. POFF,
IN ASSOCIATION WITH
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CARTER & ROE
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Attorneys for Petitioner

PROOF OF SERVICE

I, John K. Brewer, Office Manager of Thiel Press, printer of the within petition for petitioner, depose and say that on the ___ day of _____, 1968, copies of the foregoing petition were served in accordance with Rule 33 of the Rules of the Supreme Court of the United States, by mailing a copy of same, with first class postage prepaid, to the following counsel of record:

Robert Y. Button
Attorney General of Virginia
Supreme Court - State Library Building
Richmond, Virginia 23219

William P. Bagwell, Jr.
Assistant Attorney General
Drawer 1395
Richmond, Virginia 23211

_____
John K. Brewer

Subscribed and sworn to before me at Washington, D.C., this ___ day of _____, 1968.

_____
Notary Public

My Commission expires: _____

APPENDIX

Present: All the Justices

ONE 1963 CHEVROLET PICKUP TRUCK, ET AL.

v Record No. 6545

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF BOTETOURT COUNTY

Earl L. Abbott, Judge

This litigation was commenced when the Commonwealth's Attorney filed in the trial court an information (Code, § 4-56 [d]) alleging that an "ABC Investigator" had seized a 1963 Chevrolet pickup truck purportedly owned by Thomas J. Mull "for the reason that at the time" of seizure alcoholic beverages were being illegally transported in the vehicle (Code, § 4-72). The information prayed that the vehicle be condemned and sold and the proceeds thereof disposed of according to law.

Notice of the information was served on Mull and on the holder of a lien on the vehicle. Mull posted bond and secured release of the vehicle from seizure (Code, § 4-56 [e]).

The trial court heard the evidence and ordered forfeiture of the bond posted by Mull. To the final order embodying that action, we granted Mull a writ of error.

A scanty narrative statement contained in the record shows that on March 14, 1966, "A. B. C. Agent" G. M. Whiteside, "acting on prior knowledge and information," stopped Mull's vehicle on the highway; that the agent "observed a quantity of alcoholic beverages on the front seat" and "some sacks in the vehicle and. . .some bottle tops (or tops of bottles) that he concluded were alcoholic beverages"; that the agent "proceeded to search the truck and found

four gallons of A.B.C. liquor"; and that "he stopped the vehicle and searched it without a search warrant."

The dispute in the trial court revolved around the application of Code, § 4-56, a part of The Alcoholic Beverage Control Act. That Code section provides that where any officer charged with enforcement of the alcoholic beverage laws shall have reason to believe that alcoholic beverages are being illegally transported in a vehicle, it shall be his duty to obtain a legal search warrant and search such vehivle. If alcoholic beverages being illegally transported are found in the vehicle, the officer shall seize the beverages and also shall seize the vehicle and arrest all persons found in charge thereof. Other portions of the Code section prescribe the procedure for forfeiture of the vehicle by the court and provide that the alcoholic beverages seized shall be deemed contraband.

At the outset of our consideration of this case, we are confronted with a woefully inadequate record. We are called upon by Mull to reverse a judgment, which is presumed to be correct, in a situation where it is difficult to tell what points were relied upon in the trial court and what questions were properly preserved for appeal.

Mull's brief only adds to the problem. In the opening part of the brief, it is stated that four questions, with one question divided into two parts, are involved. However, when we turn to the argument portion of the brief, we find that only one question is actually argued.

From an examination of the record and an analysis of Mull's argument, we believe that there is properly presented for decision but one question and that is one of law: whether, under Code, § 4-56, the issuance of a search warrant is, in all instances, a condition precedent to the valid seizure and forfeiture of a vehicle used for the illegal transportation of whiskey.

We agree with Mull that as the result of the holding in the recent case of *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.ed.2d 170, the rule ex-

cluding evidence obtained by a search and seizure unlawful under the Fourth Amendment to the Constitution of the United States is now applicable to state forfeiture proceedings. But we cannot agree with Mull's contention that the effect of that holding as related to a failure to secure a search warrant under Code, § 4-56, is to preclude forfeiture, as a matter of law, in every case.

We also agree with Mull that we have said of Code, § 4-56 that it is without ambiguity and must be construed according to the ordinary and reasonable meaning of the language employed. *Cason v. Commonwealth*, 181 Va. 297, 303, 24 S.E.2d 435, 437. And we recognize, as Mull asserts, that Code, § 19.1-88 prohibits search without a warrant and makes it a misdemeanor for an officer or other person to do so. But, contrary to what Mull says, it does not necessarily follow from the foregoing that the legislature intended by the enactment of Code, § 4-56 to limit the search and seizure power of officers charged with enforcing the alcoholic beverage laws to those instances where such officers are armed with search warrants.

"It must always be remembered that what [the Fourth Amendment to] the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 106, 80 S.Ct. 1437, 4 L.ed.2d 1669, 1680. And we have said of our statutes (Code §§ 19.1-85 to 19.1-89) providing for the issuance of search warrants and forbidding search without a warrant that there requirements are the same in substance as those contained in the Fourth Amendment to the Constitution of the United States. *Zimmerman v. Bedford*, 134 Va 787, 801-802, 115 S.E. 362, 366.

In construing the provisions of the federal constitution, the federal courts have recognized, and in construing constitutional and statutory provisions, this court has recognized, that a search and seizure without a warrant is not unlawful if reasonable. For example, a search and seizure is not unlawful, despite the lack of a search warrant, if it occurs:

(1) Where the search is consented to, *Drummond v. United States*, 350 F.2d 983, 988-989 (8th Cir. 1965); *Rees v. Commonwealth*, 203 Va. 850, 864-866, 127 S.E. 2d 406, 416-417, *cert. denied*, 372 U.S. 964, 83 S.Ct. 1088, 10 L.ed.2d 128;

(2) Where the search is incident to a lawful arrest, *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.ed. 653, 657; *Morris v. Commonwealth*, 208 Va. 351, 334, 157 S.E.2d 191, 194; and

(3) Where the search is of abandoned premises or property, *Feguer v. United States*, 302 F.2d 214, 248-250 (8th Cir. 1962), *cert. denied*, 371 U.S. 872, 83 S.Ct. 123, 9 L. ed. 2d 110; *Hawley v. Commonwealth*, 206 Va. 479, 481-484, 144 S.E.2d 314, 316-318, *cert. denied*, 383 U.S. 910, 86 S.Ct. 894, 15 L.ed.2d 665.

It has been held also that a seizure made without a search, that is, where that which is seized is in plain and open view, is not unlawful. *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.ed.2d 726, 744.

There are, therefore, specifically recognized exceptions to the general requirement that a search warrant must be secured before a lawful search may be conducted or a valid seizure made. The crucial inquiry becomes, then, whether the legislature intended, in the enactment of Code, § 4-45, to prohibit forfeiture in all cases where no search warrant has been secured, intending to include in the prohibition even those instances where the recognized exceptions would otherwise apply to save the legality of a search or seizure without a warrant.

To aid the resolution of the inquiry, we quote the pertinent portions of Code, § 4-56:

> "§ 4-56. *Search, seizure and forfeiture of conveyances or vehicles used in violation of law; disposition of beverages; arrests.* – (a) *Search, seizure and delivery to sheriff or sergeant.* – Where any officer charged with the enforcement of the alcoholic beverages, illegally acquired, or that alcoholic beverages

> being illegally transported, are, in any conveyance or vehicle of any kind. . .it shall be the duty of such officer to obtain a legal search warrant and search such conveyance or vehicle, and if such illegally acquired alcoholic beverages or alcoholic beverages being illegally transported in amounts in excess of one quart be found therein, he shall seize the same, and shall also seize and take possession of such conveyance or vehicle and deliver the same and the alcoholic beverages so seized, to the sheriff of the county, or the sergeant of the city in which such seizure was made, taking his receipt therefor in duplicate.
>
> "(b) *Arrests.* — The officer making such seizure shall also arrest all persons found in charge of such conveyance or vehicle and shall forthwith report in writing, of such seizure and arrest, to the attorney for the Commonwealth for the county or city in which such seizure and arrest were made."

In support of his position, Mull relies most heavily, of course, upon that language of Code, § 4-56 which states that "it shall be the duty" of an officer "to obtain a legal search warrant and search such conveyance or vehicle." That language, together with the prohibition in Code, § 19.1-88 against search without a warrant, Mull argues, "would prohibit all searches and resulting forfeiture proceedings without the benefit of a proper search warrant."

Mull's argument, however, if followed to its logical conclusion, would mean not only that all searches and seizures and resulting forfeiture proceedings would be prohibited if undertaken without the prior issuance of a search warrant, but also that *all arrests* for the illegal transportation of whiskey would be prohibited if made by an officer *unarmed with a search warrant.* That would be so because the statute provides, in inverse sequence, that forfeiture shall follow arrest, that arrest shall follow seizure, that seizure shall follow search, and that search shall follow the securing of a search warrant. If Mull's view is correct that no search, seizure, or forfeiture may be accomplished without the prior

issuance of a search warrant, it would be just as logical to say that no arrest for illegal transportation may be made without such prior issuance.

Such a view would give to the statutory language a distorted and unreasonable meaning, stultifying the practical enforcement of the statute itself. It cannot be seriously contended that the legislature, by enacting Code, § 4-56, intended to withhold from Alcoholic Beverage Control agents, unless they are armed with search warrants, one of the most basic powers held by law enforcement officers—the power to make arrests for offenses committed in their presence. Especially must such a suggestion fail in light of the provisions of Code, § 4-8, another part of The Alcoholic Beverage Control Act. The latter Code section provides that such officers as shall be designated by the Alcoholic Beverage Control Board shall be vested with like power to enforce the provisions of the Act and the criminal laws of the State as is vested in sheriffs of counties and police of cities and towns.

By the same token, we cannot find in Code, § 4-56 an intent on the part of the legislature to prohibit the search and seizure or the seizure alone of a vehicle without a search warrant in those exceptional instances where such action would otherwise be lawful; for example, when the search is with consent, is incident to a lawful arrest, is of abandoned property, or where no search is necessary because that which is seized as contraband is in plain and open view.

If follows, therefore, that we answer in the negative the question of law presented by this appeal and hold that the issuance of a search warrant is not, in all instances, a condition precedent to the valid seizure and forfeiture of a vehicle used for the illegal transportation of whiskey.

Mull's argument recognizes no exception to his contended-for rule that the issuance of a search warrant is a necessary prerequisite to every valid forfeiture proceeding. It is not

necessary to discuss, therefore, whether his case falls within one of the recognized exceptions.

The judgment of the trial court will be affirmed.

AFFIRMED.

VIRGINIA:

Before John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia, on Friday, the 16th day of February, 1968, in vacation of said Court.

One 1963 Chevrolet Pickup Truck and Thomas J. Mull, Plaintiffs in error,

against Record No. 6545 Defendant in error

Commonwealth of Virginia

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiffs in error, by counsel, praying for a stay of execution of the judgment entered herein on January 15, 1968, in order that they may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case entered on January 15, 1968, be, and the same is hereby, stayed, until the 15th day of April, 1968, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner, Thomas J. Mull, from custody, if in custody, or to release his bond if out on bail.

/s/ John W. Eggleston
Chief Justice of the Supreme
Court of Appeals of Virginia